IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

Case no: 70/2022

In the matter between:

THANDIWE ANGEL MOSHABANE	**APPLICANT**
and	
PAMELA NOSIPHO MTSHAGI (KAVE)	**FIRST RESPONDENT**
REMAX ESTATE AGENT	**SECOND RESPONDENT**
XHANTI MTONGANA	**THIRD RESPONDENT**
ZONKE BUDAZA INC.	**FOURTH RESPONDENT**
ZONKE BUDAZA	**FIFTH RESPONDENT**
SIMON JONKER	**SIXTH RESPONDENT**
MASTER OF THE HIGH COURT	**SEVENTH RESPONDENT**

JUDGMENT

Noncembu J

[1] This matter concerns the validity of a will, hence being presided over by two judges.[1] Primarily the applicant seeks an order disqualifying the first respondent from inheriting as a beneficiary from the will of the late Nomfundo Ivy Kave (the testatrix) dated 11 June 2018.[2] In the alternative, she seeks an order revoking the aforementioned will and declaring it as null and void in terms of section 2(1)*(a)* of the Wills Act 7 of 1953 on account of forgery on the part of the first respondent. Ancillary relief consequent upon the granting of the aforementioned orders is also sought against the second to the seventh respondents.

Preliminary aspects

[2] The circumstances surrounding the application present an interesting legal quagmire. In addition, the papers in the court file were prepared in such a haphazard manner that it took studious effort to be able to decipher them. To put things in context, the following timeline gives a clearer perspective on how things unfolded in the matter.

[3] On 8 March 2022 an order for substituted service was granted against the first respondent by Zietsman AJ of this division.

[4] In terms of this order, the papers in the main application were to be served on the first respondent via WhatsApp message and by a publication in The Herald Newspaper in English and in isiXhosa. The first respondent was also given ten days within which to file her notice of intention to oppose the application.

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[1] In terms of rule 19*(b)*(iv) of the Eastern Cape Practice Rules.

[2] The application is in term of sections 2(1)*(a)*, 4 and 4A of the Wills Act. Reference to section 5 is taken to have been in error as the said provision was repealed by Act 43 of 1992.

[5] It seems however, and this is not disputed by the applicant, that service was only effected via WhatsApp message on the first respondent, and in that message the court order itself was not included. What was included in the message was a notice of motion in the main application, indicating that same would be heard on 8 March 2022 (same date on which the message was sent) and an application for substituted service which was said to be set down for 17 April 2022, a date which manifestly fell on a Sunday.

[6] The message also stated that the first respondent had ten days within which to file her notice of intention to oppose the application.[3] Following upon the said message, the first respondent (through her attorney) filed her notice to oppose the substituted service application on 14 April 2022, unbeknown to her that the said application had already been granted. It can therefore not be gainsaid that there was non-compliance with the court order of Zietsman AJ regarding the substituted service.

[7] On 23 March 2022 the applicant filed a notice of set down, unopposed, with the registrar of this Court, setting the matter down for 12 April 2022. The matter, however, was struck off the roll on the day in question by Rugunanan J as there had been no proper service on the respondents.

[8] The matter was again set down before Ah Shene AJ on 7 June 2022 where it was postponed until 10 August 2022 for two judges to preside over it[4] and for the office of the state attorney and the Master of the High Court to be served. On 10 August 2022 the matter served before myself and Bands AJ (as she then was).

[3] See Annexure 'K2' at 31 of the first index.
[4] See above footnote 1.

[9] On this date the applicant, an admitted attorney and an officer of the court, appeared in person and the first respondent was represented by Mr Jaco Hattingh. The applicant is the stepdaughter of the testatrix. The testatrix was married to her late father (Mzingisi Gladstone Khave) who had predeceased the testatrix. The two were married out of community of property on 19 November 1983.[5]

[10] No opposing papers had been filed by the first respondent at that stage whilst the sixth and the seventh respondents had filed a notice to abide. Noting discrepancies in the matter, specifically, the fact that there were other beneficiaries to the impugned will who were not joined as parties; the fact that the applicant was the stepdaughter of the testatrix and not a beneficiary in the will; as well as the absence of opposing papers, we asked the parties to address us on these issues.

[11] This apparently infuriated the applicant who was adamant that she was ready to proceed with the matter. In a fit of anger, she made spurious allegations against everybody in the building, including the court, as well as previous judges who had presided over the matter of, *inter alia*, siding with and favouring the first respondent. She thereafter stormed out of the court whilst the court was still trying to address her.

[12] Mr Hattingh informed the court that the first respondent had not been given proper notice of set down of the matter in accordance with the joint rules of practice of this division, hence no opposing papers were filed for the first respondent. On the papers before court there was no proof that there was proper service on the first respondent.[6]

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[5] In accordance with the relevant provisions of the Black Administration Act 38 of 1927, as was applicable at the time.

[6] See order dated 10 August 2022 at 140 of the index.

[13] The matter was thus postponed *sine die* in the absence of the applicant with a directive that the first respondent was to file her opposing papers, if any, within 15 days of the order.

[14] The main application was argued before my brother Malusi J and I on 20 April 2023 after having been set down by the first respondent. This was to facilitate finalisation of the matter seeing as the applicant had taken no further steps since its postponement on 10 August 2022. The matter was initially set down for February 2023, but was postponed to 20 April 2023 on application by the applicant who deposed to an affidavit stating *inter alia*, that she had not been informed of the date of set down.

[15] At the hearing, the matter ran for just short of two hours in which time it was mainly the applicant who was addressing the court. Most of her address pertained to spurious allegations of unfair treatment she had received from court officials at the office, respondent's representatives and the various judges who had presided over the matter. Towards the end of the court day, she alleged that she was not in a position to continue with her argument and that she would also not be available the next day. At that time counsel for the first respondent had not had an opportunity to address the court in answer to the applicant's contentions nor to set out the first respondent's submissions on the application.

[16] The Court then directed the parties to file written submissions, with deadlines set as follows: the applicant's submissions supplementing her argument in court were to be filed by 12 May 2023; and counsel for the first respondent was to file by 19 May 2023. On realising, after receipt of the first respondent's written submissions, that the applicant had not been afforded an opportunity to reply to the first respondent's submissions, I caused my registrar

to send her an email advising her of same and affording her the opportunity to exercise her right of reply.

[17] When no response was received from her, my registrar contacted her telephonically on 20 June 2023 to establish if she had received the email and whether or not she intended to make written submissions in reply. The response received from her was that she had seen the email, she had no intention of opening it nor of replying to anything. It was only at that point that the Court was able to start with the judgment in the matter.

The main application

[18] The applicant was the stepdaughter of the testatrix formerly married to her late father, Mzingisi Gladstone Khave in his lifetime. The applicant's father passed away intestate on 11 March 2013.

[19] The first respondent was appointed by the sixth and seventh respondents as the executrix of the deceased estate of the late Nomfundo Ivy Khave (the testatrix). In her papers she identifies herself as the biological daughter of the testatrix. This is disputed by the applicant.

[20] The main asset in the impugned will is a house situated at 177 Caledon Street, Sherwood, Gqeberha, which has been placed on the market by the second and third respondents. The second respondent is an estate agency and the third respondent is an estate agent under the employ of the agency (the second respondent). The second respondent has been given a mandate to sell the property in question which currently has an offer pending. One of the ancillary orders sought by the applicant in the notice of motion is that she be handed the title deed of the house which is currently in possession of the second and third respondents.

[21] The fourth respondent is a firm of attorneys responsible for the winding up of the deceased estate of the testatrix and the fifth respondent is the director at the firm.

[22] The sixth respondent is the Deputy Master of the High Court. The sixth and seventh respondents accepted the impugned will and granted the first respondent an appointment letter as the executrix of the deceased estate. The applicant is also seeking withdrawal of the said acceptance and a revocation of the letter appointing the first respondent as the executrix.

[23] In her founding affidavit, the applicant alleges that the first respondent signed as a witness to the will and as such she is disqualified from benefitting therefrom in terms of section 4A of the Wills Act. This she bases on the apparent signature on the will where the witness signed as P Mtshage, contending that such refers to the first respondent (*Pamella* Nosipho Mtshage). (Emphasis intended.) No other evidence is tendered to support this allegation other than the corresponding initials.

[24] Further, the applicant alleges that the will in question is fraudulent as the signature of the testatrix as reflected therein does not correspond with her signature as reflected on other documents she previously signed. Nothing more is tendered in the form of any evidence of her personal knowledge of the testatrix's signature other than the documents she appended to her papers to support this claim.

[25] She also challenged the veracity of Mr Gordon Anthony Parry, a non-practising attorney who assisted the testatrix in drafting the impugned will. She alleged that Mr Parry's practice closed down in 2013 and that he had moved to Cape Town, therefore, the circumstances under which he drafted the

testatrix's will were suspicious. Notably, in her written submissions she states that the said practice was closed in 2019.

[26] In answer, the first respondent denies that she signed the will as a witness as alleged in the applicant's papers. In support thereof she appended an affidavit deposed to by one Phathiswa Mtshage, who claims to be the person who signed as a witness on the impugned will. Mr Parry also deposed to a supporting affidavit where he states, *inter alia*, that he used to have a practice in Kabega, Gqeberha until August 2019 when he moved his name to the roll of non-practising attorneys.

[27] He contends that the testatrix was his client when he was a practising attorney and that he had drafted several wills for her, the last one of those having been signed on 19 January 2018,[7] and the amended version thereof signed on 11 June 2018 when her son, Andile had passed on.[8] In terms of the said will he was nominated as the executor of the testatrix's estate, which nomination he renounced when he ceased practising.[9]

[28] In further opposition of the matter, the first respondent also raised a point *in limine* of non-joinder. She submitted that the other nominated beneficiaries in terms of the will; Inaminkosi Buwa and Nontsikelelo Francis Mabangula, who have a direct and substantial interest in the matter were not joined as parties in the proceedings. She contended that this was dispositive of the matter.

[29] During argument in court, counsel for the first respondent, however, did not persist with this point *in limine* when it became apparent that the applicant

[7] Index; p 108, annexure 'GAP1'.
[8] Index; p109, Annexure 'GAP2'.
[9] Index; p 120, Annexure 'GAP3'.

did not seem to comprehend the legal point being taken, repeatedly stating that the first respondent should have joined those parties.

[30] At the hearing of the matter, in an effort to try and curtail the already protracted proceedings (as evidenced above) where history of the matter had proved a tendency of being shambolic, the court identified three main issues to be addressed by the parties in their submissions. These were:

30.1 *Locus standi*;
30.2 Hearsay evidence; and
30.3 Material disputes of facts.

[31] It behoves me to mention that for an admitted attorney, the conduct of the applicant during the proceedings was found to be vastly wanting. On the issue of *locus standi*, despite being directed by the court time and again, she continuously attacked the *locus standi* of Ms Phathiswa Mtshage and Mr Parry who both deposed to affidavits in support of the first respondent's defence. At no point did she address the issue of her *locus standi*, nor that of hearsay evidence and the disputes of facts raised by the first respondent. These were also not addressed in her replying affidavit, also filed out of time.

[32] Instead, together with her written submissions she filed a supplementary affidavit for which she did not seek the leave of the Court. No basis or reasons were advanced for the late filling of the supplementary affidavit, or why the issues canvassed therein were not placed before Court earlier. This is highly improper and no doubt highly prejudicial to the first respondent who was never given an opportunity to deal with the issues raised therein. For those reasons therefore, the supplementary affidavit will be disregarded for purposes of this application.

[33] The issues in this matter are quite crisp. They are: (a) whether or not the applicant has the requisite *locus standi* to bring the current application, (b) whether or not the non-joinder of the other beneficiaries is dispositive of the matter; and (c) whether or not she has made out a case for the relief she seeks in the notice of motion.

The *locus standi* of the applicant

[34] As mentioned above, the applicant was the stepdaughter of the testatrix who was married to her late father on 19 November 1983. In her founding affidavit she submitted that the two were married in community of property. She conceded in argument however, that the marriage was out of community of property as evidenced by the appended marriage certificate. This is also in accordance with the relevant provisions of the Black Administration Act[10] in terms of which all black marriages at the time were out of community of property.

[35] The applicant is not a nominated beneficiary in terms of the impugned will. She avers that the house in question was part of her late father's estate and that she was the only daughter and legal heir to her late father's estate. She denies that the first respondent was the daughter of her late father and the testatrix.

[36] The first respondent, on the other hand, contends that the late Mr Khave and Mrs Khave (the testatrix) were her parents and that the persons listed as her parents in her baptismal certificate were actually her grandparents with whom she was staying when she was baptised. In my view, the real question in this regard is whether or not the applicant stands to inherit intestate in the event that

[10] Act 38 of 1927.

the will is declared null and void. In other words, does she have the requisite *locus standi* to bring the current application.

[37] To that end she referred this court to the decision in *Sithole and Another v Sithole and Another*[11]where the Constitutional Court made the declaration that all marriages which were out of community of property under section 22(6) of the Black Administration Act were automatically deemed to be in community of property from the date of the order (with no limitation on retrospectivity).

[38] This judgment, however, does not avail the applicant for the reasons that follow. The order by the Constitutional Court was subject to a proviso that it would not affect the legal consequences of any act or omission existing in relation to a marriage before the order was made. The second proviso was that the order would not undo completed transactions in terms of which ownership of property belonging to any of the affected spouses had since passed to third parties. Furthermore, the order was made on 14 April 2021. The testatrix died on 23 January 2021, with Mr Khave having predeceased her on 11 March 2013, prior to the Constitutional Court order being made. There was therefore no marriage in existence to be deemed in community of property at the time the order was made.

[39] I agree with counsel for the first respondent that the applicant does not appear to attack the legal consequences of her late father's intestate death. Furthermore, the consequences of the marriage out of community of property in respect of that estate appear to have crystallised, thus rendering the matter to fall under the exclusions contemplated in the *Sithole* decision. The applicant therefore cannot find recourse relying on *Sithole*. She has therefore failed to satisfy this Court that she is clothed with the requisite *locus standi* to bring the current application. In my view, that becomes dispositive of the matter.

[11] *Sithole and Another v Sithole and Another* [2021] ZACC 7; 2021 (5) SA 34 (CC); 2021 (6) BCLR 597 (CC).

Discussion on the merits

[40] For the sake of completion, and in the event that I am wrong on the finding above, I now deal with the merits of the matter.

[41] The applicant alleged in her founding affidavit that the first respondent signed the will as a witness and is therefore disqualified from benefitting therefrom. She also alleged that the will in question is fraudulent as it was forged and should therefore be declared null and void.

[42] In answer the first respondent has denied that the witness signature on the impugned will is hers or that she signed the will as a witness as alleged by the applicant. In support of her denials two witnesses including an attorney, have deposed to affidavits stating that they were present when the will was signed and confirming the circumstances surrounding the signing thereof, thus confirming that the will was not fraudulent or forged. Mr Gordon Parry confirmed that he drafted the will in question at a time when he was still a practising attorney. This was not gainsaid. Ms Phathiswa Mtshagi confirmed that she signed as a witness when the will in question was drafted. Both witnesses confirmed that the first respondent was not present during this process. *Prima facie* this appears to a material dispute of fact.

[43] In terms of the Plascon-Evans rule, when factual disputes arise in motion proceedings final relief can be granted to the applicant only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. The only exception to this rule is where the allegations or denials are so far-fetched that the court is justified in rejecting them on the papers.[12]

[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[44] This rule was again affirmed by the SCA in *National Director of Public Prosecutions v Zuma*[13] where the following was held:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. … It is well established under the Plascon-Evans Rule that where in motion proceedings disputes of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's versions consist of bold or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[45] The Uniform Rules make provision for circumstances when there are genuine disputes of fact in rule 6(5)(g) which states:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate direction as to pleadings or definition of issues, or otherwise.'

[46] It has been held that where a litigant avers a dispute of fact on the papers which is said to be incapable of resolution on the papers, a court must first establish whether there exists a genuine or real dispute of fact.[14] It has been

[13] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA) para 26.
[14] *Dorbyl Vehicle Trading & Finance Co (Pty) Ltd v Northern Cape Tour and Chater Service CC* [2001] 1 All SA 118 (NC) at 123H, *Firstrand Bank of Southern Africa Ltd v Pretorius & Another* 2002 (3) SA 489 (C) at 497D-E.

stated that the proper approach is not to accept at face value an averment that there is a dispute of fact.

'Thus, while the court should be circumspect in its approach, 'if on the papers before court, the probabilities overwhelmingly favour a specific factual finding, the court should take a robust approach and make that finding.'[15]

The court should closely scrutinize the alleged dispute of fact in order to decide whether there is indeed a real dispute of fact that cannot satisfactorily be determined without the aid of oral evidence.

[47] The applicant relies on bald, unsubstantiated allegations regarding signature and fraud issues. No explanation or evidence is provided as averted earlier in this judgment. The answer provided by the first respondent is detailed and supported by cogent evidence.

[48] In my view the ineluctable conclusion on the probabilities favour the first respondent's version as true. There is no genuine dispute of fact on the papers. The bald assertions by the applicant have been convincingly rebutted with concrete evidence. The circumstances require a robust approach. The only rational finding from the facts is that the applicant's assertions must be rejected on the papers as being without any merit.

[49] In the premises, the applicant has clearly failed to make out a case for the relief she seeks. Her application therefore cannot succeed.

Costs

[15] *South Peninsula Municipality v Evans & Others* 2001 (1) SA 271 (C) at 283E-H; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H.

[50] The first respondent has brought an application seeking leave of this Court to file a supplementary affidavit in terms of which she seeks a punitive cost order against the applicant. The application was served on the applicant. The Court not only gave her an opportunity to file her reply thereto, but she was also called to assert her right of reply and to ascertain if she intended to exercise said right when the requisite time period had expired with no response forthcoming from her. She made it categorically clear that she did not intend to reply.

[51] The application in question was therefore not opposed. In the absence of opposition therefore, and on the grounds raised for the application, I am inclined to grant the application.

[52] At the core of the application is the conduct of the applicant as an admitted attorney and an officer of the court. Counsel for the first respondent contends that the applicant took various further steps in the matter which constitute vexatious proceedings, such conduct being prejudicial to the first respondent and unbecoming of an officer of the court, thus calling for censure.

[53] Such steps include; *inter alia*, the late delivery of her replying affidavit without explanation for the lateness; attack on the integrity and credibility of the first respondent's witnesses without any proper factual foundation to base such attacks (including the baseless allegation imputing fraudulent conduct and perjury); the totally baseless attacks upon the presiding judges, alleging bias and unfairness; the baseless and unacceptable personal attacks upon the attorney and counsel of the first respondent in open court; and the totally unfounded submissions to the Court and persistence therewith, despite being directed that such submissions were bad in law.

[54] In addition to the above, the applicant sought reasons and leave to appeal against a cost order granted against her by Norman J pursuant to a postponement application she had lodged seeking the indulgence of the court. What is striking and of material relevance to these proceedings in this regard, is that the applicant submitted that her erstwhile attorney had failed to inform her of the date of set down of the matter.[16] This she detailed in an email which she sent to her erstwhile attorney, after the costs order was granted, alleging that her erstwhile attorney should pay the costs. Other than her erstwhile attorney, the email was also directed to various other persons including Van Zyl DJP (through his secretary) and the registrar of this Court.

[55] In replying to the email, her erstwhile attorney also copied all the recipients of the initial email ~~to~~. In the email, the attorney stated to the applicant that he had informed her of the set down shortly after it was received, and also attached the email he had sent to her containing the set down shortly after it was served, as well as her response to the email, confirming receipt of same.

[56] It is thus contended that the applicant's erstwhile attorney exposed the applicant as having lied to the court and thereafter again having been untruthful in the email which she directed to the numerous recipients.

[57] The applicant submitted to court that her erstwhile attorney breached the attorney-client privilege when he distributed the abovementioned email to the aforementioned persons. I cannot agree with this submission. The legal requirements for privilege to apply were aptly set out by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others.*[17] They are:

[16] This formed part of the reasons submitted by the first respondent in her application for filling a further affidavit.

[17] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197

57.1 The attorney must have acted in a professional capacity, for example the attorney must have been paid a fee;
57.2 The client must have consulted with the attorney in confidence. A communication (written or oral not intended to be confidential, cannot be privileged;
57.3 The client must have sent the communication (oral or written) for the purposes of obtaining legal advice from the attorney;
57.4 The advice must have been legal advice and not advice to help somebody to commit a crime of any kind, even if the attorney is completely unaware of the crime.

[58] The communication *in casu* pertained to the applicant's confirmation of her receipt of the notice of set down and can in my view, never be said to constitute legal advice.

[59] Whilst I agree that the conduct of the applicant in this matter requires some serious censure, I am not persuaded that a punitive cost order is the appropriate mechanism to deal with such on the circumstances of this matter. Not only is the applicant an admitted attorney, she is also an officer of the court. How she conducts herself in that capacity therefore has very serious ramifications. Her conduct in these proceedings raises some serious questions on her fitness to practice as a legal practitioner. I am therefore of the view that this is one matter where a referral to the Legal Practice Council for an investigation into her fitness to remain on the roll of legal practitioners is warranted.

Order

(CC).

[60] In the result therefore, the following order shall issue:

(a) The application is dismissed with costs.

(b) This judgment and order shall be forwarded to the Legal Practice Council to conduct an investigation on the fitness of the applicant to practice as a legal practitioner.

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V P NONCEMBU

JUDGE OF THE HIGH COURT

I agree

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T MALUSI

JUDGE OF THE HIGH COURT

Appearances

For the applicant	: In Person
For the first respondent	: *P T Marais*
Instructed by	: Jaco Hattingh Newton Park Gqeberha
For the second to the seventh respondents	: No appearances
Date of hearing	: 20 June 2023
Date judgment delivered	: 25 January 2024